Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 30, ISSUE 21 / MAY 10, 2016

WHAT'S INSIDE

RETALIATION

First Amendment protects public workers' rights for perceived protected activity

By Tricia Gorman

A New Jersey police officer who says he was demoted in retaliation for political activity he did not actually engage in can proceed with his First Amendment and civil rights claims against his employers, the U.S. Supreme Court has ruled.

Heffernan v. City of Patterson et al., No. 14-1280, 2016 WL 1627953 (U.S. Apr. 26, 2016).

In a 6-2 decision, the high court said that while the city of Patterson, New Jersey, mistakenly perceived former police detective Jeffery Heffernan's actions, its motive for demoting him is what matters.

An employer's adverse employment action, even when based on a mistake, can affect workers' engagements in protected activity and can result in constitutional harm, the majority said.

In this case, Heffernan, a detective with the Paterson Police Department, was demoted to a patrol position in 2006 after he was seen at a political rally where he said he was merely picking up a lawn sign for his mother.

"The government's reason for demoting Heffernan is what counts here," Justice Stephen Breyer wrote for the majority. "When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and the federal Civil Rights Act, 42 U.S.C. § 1983."

REUTERS/Jason Reed

Justice Stephen Breyer, shown here in 2012, wrote the majority opinion.

CONTINUED ON PAGE 18

EXPERT ANALYSIS

The new STEM OPT rule for international student training: A summary for employers

Bracewell LLP attorneys Victoria M. Garcia and Nelli Nikova discuss recent changes to the visa program for some international students and explain how the changes affect employers that provide the students with training and learning opportunities.

SEE PAGE 3

41917827

Westlaw Journal Employment

Published since May 1986

Director: Mary Ellen Fox

Editors: Tricia Gorman
Tricia.Gorman@thomsonreuters.com

Catherine A. Tomasko, Esq.

Managing Desk Editor:
Robert W. McSherry

Desk Editors:
Nyssa Gesch, Schuyler Houtsma, Jennifer McCreary, Katie Pasek, Sydney Pendleton

Graphic Designers:
Nancy A. Dubin, Ramona Hunter

Westlaw Journal Employment
(ISSN 2155-594X) is published biweekly by Thomson Reuters.

Thomson Reuters
175 Strafford Avenue, Suite 140
Wayne, PA 19087
877-595-0449
Fax: 800-220-1640
www.westlaw.com
Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomson.com.

For the latest news from Westlaw Journals, visit our blog at http://blog.legalsolutions.thomsonreuters.com/tag/westlaw-journals.

How to Find Documents on Westlaw
The Westlaw number of any opinion or trial filing is listed at the bottom of each article. The numbers are configured like this: 2016 WL 000000. Sign in to Thomson Reuters Westlaw, then type the Westlaw number into the search box at the top of the screen and click on the orange button to the right of the box.

Westlaw

TABLE OF CONTENTS

The new STEM OPT rule for international student training: A summary for employers

By Victoria M. Garcia, Esq. and Nelli Nikova, Esq.
Bracewell LLP

On March 11, the Department of Homeland Security published a final rule further extending the Optional Practical Training program for international students who hold non-immigrant F-1 visas to study in the science, technology, engineering and mathematics fields.

The STEM OPT extension provides a 24-month period of temporary training that directly relates to an F-1 student's program of study in an approved STEM field, replacing the current 17-month STEM OPT. This is in addition to the 12-month OPT for all students.

To qualify for STEM OPT, a student must work at least 20 hours per week.

The new 24-month rule became effective May 10. Students whose 17-month STEM OPT extension expired before then, or who had fewer than 150 days remaining on their 17-month STEM OPT extension employment authorization document May 10, are not covered under the transition plan.

WHAT EMPLOYERS NEED TO KNOW

Reporting requirements

Employers play a key role in maintaining and strengthening the integrity of the STEM OPT extension program. Although the program's various reporting requirements apply predominately to students and designated school officials, the program also requires some reporting by employers to assist in tracking STEM OPT students and their progress.

STEM OPT employers must complete a training plan, Form I-983, and designate an official with signatory authority to certify information.

> Both the employer and the student must notify the designated school official when the student's employment is terminated for any reason before the end of the authorized extension period.

Form I-983 identifies learning objectives and outlines a plan for achieving them.

The designated official certifies the information provided is true and correct and must be familiar with the STEM OPT student's goals and performance. Sections 3 through 6 of the form require specific information about the company, the agreed-upon practical training schedule, and compensation.

There is space on the form where an employer must give details regarding the tasks and assignments and how those tasks directly relate to the student's STEM degree. Employers must also describe the specific knowledge, skills and techniques the student will gain and provide a training curriculum and timeline that explain how goals will be achieved.

Employers must provide an explanation of oversight and supervision of the STEM OPT student as well as information about the measures and assessments used to confirm the student is acquiring new knowledge and skills.

Employers are expected to review each student's annual self-evaluation and attest to its accuracy. This assessment is to be submitted within 10 days from completion of the first 12 months and upon the conclusion of STEM OPT training.

Employers must also work with STEM OPT students to inform the designated school officials of any material changes to, or material deviations from, the formal training plan.

Material changes include:

- Changes to an employer identification number resulting from a corporate restructuring.
- Reduction in student compensation that is not tied to a reduction in hours worked.
- Significant decrease in hours per week that a student engages in a STEM training opportunity.
- Changes to the employer's commitments or student's learning objectives as documented on the Form I-983.

Victoria M. Garcia (L) is managing partner of **Bracewell LLP**'s San Antonio office, where she focuses on immigration, labor and employment law. She represents domestic and international companies in matters involving immigration, as well as all aspects of labor and employment. She can be reached at victoria.garcia@bracewelllaw.com. **Nelli Nikova** (R), senior counsel in Bracewell's office in Houston, specializes in employment-based non-immigrant and immigrant visas. Board-certified in immigration and nationality law, she works closely with corporate clients to provide guidance on emerging immigration policies and I-9 compliance issues. She can be reached at nelli.nikova@bracewelllaw.com.

Finally, both the employer and the student must notify the designated school official when the student's employment is terminated for any reason before the end of the authorized extension period. The employer must report the date of the student's termination or departure to the appropriate designated school official no later than five business days after such an event. Email communication will be acceptable.

The departure date is the earlier of:

- The date the employer knows the student has left the practical training opportunity.
- Five consecutive business days after the student has not reported for their practical training (without the employer's consent).

Employer site visits

A new provision in the STEM OPT rule allows the Department of Homeland Security to perform site visits to employer locations with STEM OPT students to reduce the potential for abuses of the extension and to ensure that students receive appropriate work-based learning experiences.

During site visits, the DHS will confirm that information reported on Form I-983 is accurate. Unless the visit is triggered by a complaint or other evidence of noncompliance with the STEM OPT extension regulations, employers will be given 48 hours advance notice.

As part of a site visit, the DHS may confirm that there are sufficient resources and supervisory personnel to effectively maintain the program and ask employers to provide evidence used to assess wages of similarly situated U.S. workers.

The DHS may request compliance-related information by email or phone in lieu of — or in addition to — a physical site inspection.

FICA withholding

Like regular OPT holders, STEM OPT participants generally are not subject to withholding under the Federal Insurance Contributions Act — Social Security and Medicare contributions — until after the first five calendar years that they hold F-1 non-immigrant status.

As a participant in STEM OPT, a student is not considered a resident for federal tax purposes as long as he complies with the requirements of the F-1 visa and has not already held F-1 status for parts of five calendar years. WJ

RETALIATION

EEOC's discrimination, retaliation claims against bakery to proceed

By Tricia Gorman

A California federal judge has denied the Equal Employment Opportunity Commission summary judgment on its claim that the owner of a San Jose bakery filed a defamation suit against an employee in retaliation for her complaints of discrimination.

Equal Employment Opportunity Commission v. Peters' Bakery, No. 13-cv-4507, 2016 WL 1598752 (N.D. Cal., San Jose Div. Apr. 21, 2016).

U.S. District Judge Beth Labson Freeman of the Northern District of California said the EEOC is not entitled to judgment because Charles Peters, the owner of Peters' Bakery, was able to show facts in dispute over his reason for filing the defamation claims against employee Marcela Ramirez.

In his deposition and declaration, Peters pointed to both the charges from the EEOC lawsuit and claims Ramirez allegedly posted on the Internet calling Peters a racist as the basis of his defamation suit, the judge's order said.

"Here, there is conflicting evidence as to the but-for cause of the adverse action [against Ramirez]," Judge Freeman said.

In an analysis of the decision on the Seyfarth Shaw Workplace Class Action blog, attorneys Gerald L. Maatman Jr. and Alex W. Karasik cautioned employers on how to approach EEOC depositions in retaliation cases.

"Employers facing retaliation claims should take account of this case when being deposed by the EEOC as, pursuant to its 'recipe for retaliation claims,' the government will use any unfavorable deposition testimony as the 'ingredients' in its likely forthcoming motion for summary judgment," the post said.

Maatman and Karasik are not involved in the case.

ALLEGED RACIAL COMMENTS

Ramirez, who is identified in Judge Freeman's order as Hispanic, had worked for Peters' Bakery for over a decade when Peters began subjecting her to derogatory comments and jokes about her race in 2010, the order said.

In September 2011 she filed a complaint with the EEOC alleging she was harassed and discriminated against because of her race.

The commission notified the bakery of the discrimination charges Nov. 3, 2011, according to Judge Freeman's order.

Peters sued Ramirez for defamation in small claims court in April 2012, alleging she called him a racist. The suit said the alleged defamation occurred Nov. 3, 2011, according to the order.

The EEOC then sued the bakery in federal court in September 2013 for race discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e-3(a), alleging Peters sued Ramirez in retaliation for her complaints to the agency.

REUTERS/Gary Cameron

In a March 10 motion for summary judgment on the retaliation claim, the EEOC argued "there are no material facts in dispute" concerning Peters' retaliation against Ramirez.

Citing Peters' deposition, the agency said he admitted to filing the defamation suit because of the EEOC charges. It also noted that Peters' suit said Ramirez defamed him on the exact date that the commission notified the bakery of her discrimination claims.

According to the order, a plaintiff must establish three elements to show that no material facts are disputed in a retaliation claim under Title VII and thus succeed on a motion for summary judgment:

- The plaintiff engaged in protected activity, such as filing a complaint with the EEOC.
- The plaintiff experienced an adverse employment action, such as discharge.
- There is a causal link between the activity and the adverse action.

Judge Freeman denied the EEOC's motion, finding that the agency failed to meet the third requirement for a prima facie case.

A reasonable jury cannot conclude that Peters would not have filed the defamation suit if not for Ramirez's complaints to the EEOC, the judge said.

According to the order, the EEOC cited Peters' reference to the agency's charges in his deposition, while Peters' declaration cites statements he says Ramirez posted on the Internet.

"While the EEOC's evidence is quite strong, it is insufficient to establish as a matter of law that Ms. Ramirez's filing of the EEOC charge was the but-for cause of Mr. Peters' filing of the defamation action against her," Judge Freeman said.

To succeed in a retaliation case, the plaintiff must show that her protected activity did more than just motivate the employer to take an adverse action; the plaintiff must show that her activity caused the employer's action, the order said. WJ

Related Court Document:
Order: 2016 WL 1598752

See Document Section B (P. 32) for the order.

Q&A: The Uber settlement and its impact on worker classification in the gig economy

By Tricia Gorman and Rebecca Ditsch, J.D.

Uber's recent $100 million settlement of a class action over drivers' independent contractor status will likely encourage other workers in the gig or sharing economy to pursue similar actions, labor and employment attorney Gail Gottehrer says.

Labor and employment attorney Gail Gottehrer of Axinn, Veltrop & Harkrider

Uber announced the settlement in the U.S. District Court for the Northern District of California on April 21. *O'Connor et al. v. Uber Techs. et al.*, No. 13-cv-3826; *Yucesoy et al. v. Uber Techs. et al.*, No. 15-cv-262, *settlement announced* (N.D. Cal. Apr. 21, 2016).

Under the agreement, the car service provider's drivers in California and Massachusetts will remain classified as independent contractors, but the company agreed to change some of its business practices.

Uber will institute a deactivation policy to resolve claims that the company randomly terminated drivers, according to the settlement. The deal also requires Uber to create a driver association in both states to present driver grievances to company management.

The settlement ends claims filed against the company in 2013. A group of current and former drivers alleged Uber misclassified them as independent contractors to avoid having to comply with state labor laws.

U.S. District Judge Edward M. Chen significantly expanded a statewide class of California drivers last December by invalidating Uber's driver arbitration agreements, which the judge said included class-action and collective-action waivers. *O'Connor et al. v. Uber Techs. et al.*, No. 13-cv-3826, 2015 WL 8292006 (N.D. Cal. Dec. 9, 2015).

In April the 9th U.S. Circuit Court of Appeals agreed to hear Uber's interlocutory appeal of the order. *O'Connor et al. v. Uber Techs. et al.*, No. 15-80220, *order issued* (9th Cir. Apr. 5, 2016).

In an interview with Westlaw Journals, Gail Gottehrer, a partner at Axinn, Veltrop & Harkrider, whose practice includes management-side labor and employment litigation, discusses the Uber drivers' settlement and the impact it may have on similar actions in the future.

Gottehrer was not involved in the Uber litigation.

Westlaw Journals: Why do you think the drivers decided to settle?

Gail Gottehrer: The drivers likely decided to settle for a variety of reasons, including the risks and uncertainties associated with jury trials. It's difficult to predict what a jury might do and how it might view the evidence. The jury could have found the drivers were independent contractors, resulting in the named plaintiffs and the class getting nothing and having to appeal the decision in hopes of getting it reversed so they would not be bound by it. If the named plaintiffs and the class won at trial, Uber would certainly appeal and class members would not receive any payments or other benefits for a considerable amount of time, presuming the appellate court did not reverse the verdict. If the proposed settlement is approved, the named plaintiffs and the class will receive the monetary payments and non-monetary benefits outlined in the settlement much sooner. In addition, 9th Circuit's decision to hear Uber's interlocutory appeal of the certification order added risk and uncertainty to the drivers' position and likely influenced their decision to settle now.

WJ: What impact do you think this settlement will have on the other proposed class actions pending against Uber?

GG: This settlement could serve as a roadmap for reaching settlements in class actions that have been brought against Uber in other states (other than California and Massachusetts) alleging that the drivers are misclassified as independent contractors. If the District Court grants final approval of the settlement, finding it to be fair and reasonable, other courts might also view settlements that provide for the drivers to remain independent contractors in return for monetary compensation and changes in Uber's business practices, such as providing information to drivers about their ratings and creating a driver's association, to be appropriate. Since Uber has already issued its driver deactivation policy, which applies across the United States, it may have to provide additional non-monetary relief to the class in other settlements.

WJ: Does this settlement and an earlier settlement by Uber competitor Lyft of a similar suit encourage other workers in the gig or sharing economy to file classification suits in hopes of a big payday in a multimillion-dollar settlement?

GG: The gig or sharing economy has been the target of misclassification class actions for years and we are likely to see that continue. The willingness of companies across a wide range of industries to settle these cases rather than take them to trial, as well as judicial scrutiny of settlements like the Lyft settlement, in which the judge recently rejected the proposed settlement on the grounds that the amount of money the class members would receive was too low and did not fall within the range of reasonableness, will encourage workers to continue to pursue

misclassification lawsuits. [*Cotter v. Lyft Inc.*, No. 13-cv-4065, *hearing held* (N.D. Cal. Mar. 24, 2016).]

WJ: Is it possible that future suits against other companies (assuming that Uber would settle) will succeed?

GG: Depending on the facts of the particular case and the state law regarding independent contractors that would apply to the case, if a plaintiff were to choose to take a misclassification case to trial, it is possible that the jury could be persuaded that workers in the gig or sharing economy are employees and not independent contractors. Last year, the California Labor Commissioner's Office ruled that an individual Uber driver should have been classified as an employee. While the commissioner's decision applies only to that individual driver, and is being appealed by Uber, it demonstrates that under certain circumstances these claims could be successful.

WJ: Presumably companies prefer the independent contractor model to circumvent state and federal wage requirements — breaks and overtime for example — and avoid paying medical and vacation benefits. Are there other reasons why employers might pursue that model?

GG: Companies may prefer to structure themselves using the independent contractor model because they want to be innovators, not administrators. Companies in the app-based economy focus on developing their technology and driving innovation, rather than on running large bureaucracies. For example, Uber views itself as an app company that matches drivers and riders. At the same time, it estimates that 450,000 drivers in the United States use its app each month. If Uber had to take on the administrative burdens associated with doing payroll, administering health benefits and ERISA plans, and processing expense reimbursement requests for 450,000 drivers each month, that would make it a very different kind of company than it set out to be or presumably wants to be.

WJ: There are several Uber cases pending before the National Labor Relations Board. This settlement leaves open the question of whether Uber drivers should be classified independent contractors or employees. Any indication on how the board will weigh in on this issue?

GG: The NLRB is likely to find the drivers to be employees (covered by the National Labor Relations Act) rather than independent contractors. In a recent decision, Regional Director Cornele Overstreet found a group of taxicab drivers who were seeking to unionize to be employees, and not independent contractors. [*AAA Transp./Yellow Cab and Tucson Hacks Ass'n*, No. 28-RC-106979 (Oct. 23, 2015).] In addition to focusing on the degree of control that the company exercised over the cab drivers, the regional director looked at an additional factor concerning independent contractor status, namely, whether the drivers had actual entrepreneurial opportunity for loss or gain. Finding, among other things, that the drivers were dependent on the cab company's dispatch system to generate revenue, had limited ability to select their trips, and did not have input into important business decision like setting rates and marketing, the regional director concluded that the taxicab drivers had only theoretical entrepreneurial opportunity. Based on that finding and other evidence in the record, the regional director held that the taxicab drivers were employees of the taxicab company and entitled to vote on whether to unionize. WJ

Misclassifying workers violates bargaining rights, NLRB official says

(Reuters) – The International Brotherhood of Teamsters' efforts to unionize a trucking company's drivers at the Port of Los Angeles has received a boost from a National Labor Relations Board official who says the company's misclassification of its workers as independent contractors violated their collective bargaining rights.

Intermodal Bridge Transport, No. 21-CA-174483 (N.L.R.B. Apr. 20, 2016).

The office of NLRB Regional Director Olivia Garcia in Los Angeles on April 20 filed an unfair labor practice charge against Intermodal Bridge Transport, saying the company treated its drivers at the port as contractors in order to block the Teamsters from organizing them. The National Labor Relations Act permits only employees to join unions.

The Teamsters last year stepped up an existing effort to unionize thousands of workers from different companies at the Port of Los Angeles in Long Beach. Intermodal drivers went on strike April 20, hours before Garcia's office issued the charge.

The charge was the first of its kind since NLRB General Counsel Richard Griffin said in a memo in March that cracking down on worker misclassification was a top focus for his office. He told regional directors to refer cases involving misclassification claims to the board's Division of Advice, which handles queries about novel legal issues.

The NLRB is often asked to decide whether workers are employees or independent contractors when unions seek to represent them or file unfair labor practice complaints on their behalf. The board has developed a test that considers the degree of control companies exert and whether workers are free to run their own businesses, among other factors.

But there is little board precedent on whether the intentional misclassification of workers itself violates provisions of the NLRA that bar employers from interfering with workers' rights to organize.

The recent memo indicates that regional directors will likely begin issuing more charges like the one against Intermodal, and that Griffin's office may be eyeing "gig economy" companies like Uber and Lyft that are already facing union campaigns and wage-and-hour claims stemming from their classification of workers, said Adam Vergne of Seyfarth Shaw in Washington, District of Columbia.

Misclassification has become one the top issues facing employers who rely on contract labor, with a wave of class actions filed over the past decade. Those lawsuits are typically brought under the Fair Labor Standards Act or comparable state laws and seek wage-and-hour protections for workers such as minimum wage and overtime.

The April 20 charge stems from a 2015 complaint filed by the Teamsters that says Intermodal drivers are controlled like employees but not classified as such because it would allow them to unionize. The union is represented by Bush Gottlieb in California.

In addition to the claim involving classification, Garcia's office said Intermodal threatened and interrogated workers who support the Teamsters' efforts.

The union in a statement said the regional director's move was "historic" and represented an acknowledgement that worker misclassification was not just a wage-and-hour issue.

"Misclassification deliberately robs workers of their right under the law to unite for a better future," said Teamsters Vice President Fred Potter.

An Intermodal vice president named in NLRB documents did not return a request for comment April 21. WJ

(Reporting by Daniel Wiessner)

Car transport company denies retaliation against pregnant driver

By Tricia Gorman

A car transport company in California says it did not discriminate or retaliate against a driver who alleges she faced harassment during her pregnancy and ultimately quit because of "intolerable working conditions."

Martinez v. Fail Safe Transit Inc. et al., No. BC610928, answer filed (Cal. Super. Ct., L.A. Cty. Apr. 12, 2016).

Fail Safe Transit Inc. and owner Ignacio Gonzalez argue in an answer filed in the Los Angeles County Superior Court that Angie Martinez's suit fails to state a claim.

The defendants deny Martinez's entire list of allegations and include more than two dozen affirmative defenses in the filing.

'INTOLERABLE WORKING CONDITIONS'

Martinez's suit, filed Feb. 19, alleges 22 claims for harassment, discrimination and retaliation under the California Fair Employment and Housing Act, Cal. Gov't Code § 12940, plus various wage-and-hour claims.

According to the suit, Martinez began working for Fail Safe in September 2014. Her position required her to drive rental cars from one location to another, generally from Los Angeles International Airport to points in Southern California.

When she learned she was pregnant, she avoided telling anyone because it did not affect her ability to work, the complaint says.

She finally disclosed her pregnancy to a company shuttle driver who was transporting car drivers between pickup points, she says. When the driver would not stop for a bathroom break, Martinez says she told him she was pregnant in the hopes that he would change his mind. The driver allegedly still refused to stop.

Because of the time Martinez took for bathroom breaks, several shuttle drivers refused to transport her, which prevented her from working for long stretches and cost her income, the complaint says.

Martinez says she was further humiliated when a manager allegedly suggested she stop working while she was pregnant.

"You don't want your water to pop when you are far and have the baby in the van," he allegedly told her.

After several months of this treatment, Martinez was making very little money and resigned Feb. 9, 2015, citing "intolerable working conditions," the suit says.

Martinez further alleges that the company violates state wage laws by failing to pay minimum wages for all hours worked, refusing to pay drivers for time spent getting to and from locations, and neglecting to compensate them for unused rest or meal breaks.

She seeks at least $5 million in compensatory damages, $50 million in punitive damages for the company's alleged willful acts and malice, and more than $4,000 in overtime wages and other damages.

CLAIMS ARE BARRED, DEFENDANTS SAY

The defendants argue Martinez cannot proceed with her suit because she failed to follow state Department of Fair Employment and Housing procedures and exhaust available administrative remedies. Also, the case is barred by the Fair Employment and Housing Act's statute of limitations, the answer says.

Under the FEHA, a claimant has one year to file claims with the DFEH, which conducts an investigation, can attempt to settle the claims and if resolution fails will issue a right-to-sue notice before claims can proceed to court.

Among the other defenses listed in the answer, the defendants say any of Martinez's alleged injuries were caused by the acts of others.

Martinez also could not perform the functions of the job and never asked for a reasonable accommodation, the answer says.

The suit does not show that the defendants willfully violated state law, and no alleged act or omission justifies the award of punitive damages sought by Martinez, the defendants say.

Finally, the defendants say they abide by the state's wage-and-hour laws in good faith. WJ

Attorneys:
Plaintiff: Cathe L. Caraway-Howard, Playa Del Rey, CA

Defendants: Robert Ackermann, West Los Angeles, CA

Female attorneys ask judge to approve Farmers Group pay bias settlement

By Jason Schossler

A group of current and former Farmers Group Inc. female attorneys is seeking preliminary approval of a proposed $4.1 million settlement in a class-action lawsuit alleging the insurer discriminates against women by paying them lower wages than their male counterparts.

Coates v. Farmers Group Inc. et al., No. 15-cv-1913, memo supporting approval of settlement filed (N.D. Cal., San Jose Div. Apr. 13, 2016).

The proposed deal calls for Farmers to split the payment among a class of nearly 300 female attorneys who worked in the insurer's claims litigation department after June 8, 2012, according to the plaintiffs' motion for preliminary approval filed in the U.S. District Court for the Northern District of California.

The plaintiffs also want U.S. District Judge Lucy H. Koh to sign off on an attorney fee award of up to $1.8 million that is included in the proposed settlement.

Under the terms of the deal, Farmers will hire an independent human resources consultant to help reviews its employment policies concerning attorney compensation, salary grade placement, performance ratings and promotions, the motion says.

Additionally, Farmers agreed to conduct annual statistical analyses to confirm that its compensation policies are not hurting female attorney employees.

The motion says the proposed deal is well within the "range of reasonableness" and is in the best interest of the class members.

"Farmers' willingness to agree to these robust business practices reflects a real commitment to change," the motion says.

The parties reached the proposed settlement after Judge Koh conditionally certified the collective action last December.

In her ruling, Judge Koh said lead plaintiff Lynne Coates offered enough evidence to support the allegation the putative class members were the "victims of single decision, policy or plan" that resulted in class-wide unequal pay for female attorneys. *Coates v. Farmers Grp.*, No. 15-cv-1913, 2015 WL 8477918 (N.D. Cal. Dec. 9, 2015).

SALARY DISCREPANCIES

According to the amended complaint in the case, Farmers hired Coates as a full-time attorney in April 2011 at a salary of $90,000 year. Coates says she received positive performance reviews, and her salary increased to $99,600 in April 2014.

However, Coates learned in 2014 that a male counterpart, who had less experience than her but shared many of the same responsibilities in the claims litigation department, was earning $185,000, according to the suit.

The complaint also identifies other less-experienced male attorneys who earned higher salaries than Coates for performing substantially equal work.

When Coates complained about the disparities, Farmers allegedly retaliated against her by reducing her responsibilities, including taking away court appearances she had been scheduled to handle, the suit adds.

The complaint accuses Farmers of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e), and the Equal Pay Act of 1963, 29 U.S.C.A. § 206(d.).

In its answer to the complaint, Farmers said it exercised reasonable care to prevent and promptly correct any alleged discriminatory behavior in the workplace.

The insurer also said any decisions involving the terms and conditions of the proposed class members' employment were made "solely for legitimate, business-related reasons unrelated to sex."

A hearing on the plaintiffs' motion for preliminary approval of the settlement has been scheduled for June 23. WJ

Related Court Documents:
Motion for approval of settlement:
2016 WL 1567307
First amended class-action complaint:
2016 WL 517996

Fair Credit Reporting Act applies to crime database search, judge says

By Daniel Rice

Data analytics and information provider CoreLogic has lost its latest bid to convince a federal judge that the Fair Credit Reporting Act's requirements to ensure the accuracy and privacy of consumer information do not apply to its criminal records database service.

Henderson et al. v. CoreLogic National Background Data LLC, No. 12-cv-97, 2016 WL 1574048 (E.D. Va. Apr. 18, 2016).

The decision by U.S. District Judge Robert E. Payne of the Eastern District of Virginia comes in one of two FCRA lawsuits against CoreLogic National Background Data LLC.

The plaintiffs in both suits allege they lost out on employment opportunities because background checks using CoreLogic's database contained damaging criminal history information belonging to someone else.

CoreLogic has argued that the Fair Credit Reporting Act, 15 U.S.C.A. § 1681, does not apply to its criminal history database, which employers or background check companies pay to search. The Irving, California-based company filed a motion for partial summary judgment based on its theory.

Judge Payne first denied CoreLogic's motion in February. *Henderson v. CoreLogic Nat'l Background Data LLC*, No. 12-cv-97, 2016 WL 685127 (E.D. Va. Feb. 18, 2016). He stuck to his original analysis in an April 18 opinion denying the company's motion to reconsider.

PLAINTIFFS ALLEGE DENIED EMPLOYMENT

Plaintiffs Tyrone Henderson and James O. Hines Jr. together sued CoreLogic in 2012, arguing they were denied employment after third-party background companies searched CoreLogic's database and passed on the results to the men's prospective employers.

Both plaintiffs say the results included not only their own criminal history but also serious criminal activity committed by other people with the same first and last names and dates of birth as Hines and Henderson.

Hines alleges he was not hired for a physical therapist job after the search results his prospective employer received included the registered sex offender status of another man.

Similarly, Henderson alleges he received a job offer at Interstate Brands Corp., but the company declined to hire him when a third-party background company's search of CoreLogic's database included another man's felony conviction.

CoreLogic purchases criminal records in bulk to input into its database. Records purchased in bulk do not include identifying information such as addresses or Social Security numbers, according to the opinion.

PARTIES DEBATE 'CONSUMER REPORT' MEANING

In moving for summary judgment, CoreLogic tried to use the presence of multiple individuals in the search results to its advantage. The company argued the search results do not qualify as a "consumer report" under the FCRA.

The FCRA defines "consumer report" as a communication bearing on "a consumer's" credit characteristics, character or background. CoreLogic said its search results related to several individuals, not just "a consumer."

Judge Payne rejected the company's arguments, finding that the results qualify as consumer reports because they were returned in response to a search for information about a single consumer's criminal background.

The judge's decision denying summary judgment will allow Hines' and Henderson's claim under the FCRA to proceed.

SECOND SUIT RAISES SIMILAR ALLEGATIONS

CoreLogic also faces similar claims from several other plaintiffs in another case pending before Judge Payne.

The judge granted CoreLogic's motion to dismiss as to several of the plaintiffs' claims in that case April 8. *Witt v. CoreLogic SaferentLLC*, No. 15-cv-386, 2016 WL 1441369 (E.D. Va. Apr. 8, 2016).

Some of the plaintiffs had not alleged a sufficient nexus between CoreLogic database search results and any specific denial of employment or other adverse consequences, Judge Payne said. He denied the motion as to several other plaintiffs, allowing their claims to proceed. WJ

Related Court Document:
Opinion: 2016 WL 1574048

Data privacy group says errors rampant in employee background checks

(Reuters) – A nonprofit focused on data privacy has urged a U.S. appeals court to uphold a jury verdict against a LexisNexis unit for reporting false information on an employee criminal background check, claiming errors are rampant in the industry.

Smith v. LexisNexis Screening Solutions, No. 15-2329, brief filed (6th Cir. Apr. 18, 2016).

The 6th U.S. Circuit Court of Appeals on April 18 accepted a brief from the Electronic Privacy Information Center saying companies that conduct background checks often do not independently verify records and should be held strictly liable under the federal Fair Credit Reporting Act when they send employers erroneous reports.

The FCRA requires screening companies, known as consumer reporting agencies, to "follow reasonable procedures to assure maximum possible accuracy," and places the burden on plaintiffs to prove a CRA's standards were unreasonable.

The brief came in LexisNexis Screening Solution's appeal of a $225,000 federal court verdict awarded in 2014 to David Alan Smith, who temporarily lost out on a truck driving job when LexisNexis sent his potential employer the criminal records of a man named David Oscar Smith.

New York-based LexisNexis in a brief filed in January by its lawyers at Seyfarth Shaw said it relies on standard industry practices and does not require applicants' middle names because some people don't have them and criminal records often don't include them. (LexisNexis is a competitor of Thomson Reuters.)

But EPIC said industry standards are too low and Smith's case was a cautionary tale of how erroneous background checks can wreak havoc on workers' lives. Smith says he missed payments on his mortgage and other bills and became depressed.

Washington, District of Columbia-based EPIC often backs plaintiffs suing companies over data breaches and other privacy issues. The group is a vocal opponent of the FBI's recent efforts to force Apple Inc. to unlock the smartphones of criminal suspects and victims.

According to court documents, Smith's former employer was purchased by Great Lakes Wines & Spirits of Michigan, which required truck drivers to re-apply for their jobs. Smith in 2012 was initially denied his old position, though Great Lakes hired him weeks later when it realized the criminal records sent by LexisNexis were for a different person.

Smith sued in U.S. District Court for the Eastern District of Michigan and a jury in 2014 awarded him $75,000 in compensatory damages and $300,000 in punitive damages, which the judge later cut to $150,000. LexisNexis appealed.

The company's lawyer, Frederick Smith, declined to comment on EPIC's brief. Smith's attorney, John Soumilas of Francis & Mailman in Philadelphia, did not return a request for comment.

More than 1,500 proposed class actions were filed under the FCRA from January 2015 to June 2015, a 22.7 percent increase over that period in 2014, according to the Consumer Financial Protection Bureau, and many cases have spawned seven-figure settlements.

EPIC in the April 18 brief said the volume of cases is not surprising, since reports prepared by CRAs frequently include sealed or expunged records and incomplete data. Many errors arise from screening companies' practice of purchasing bulk criminal records from state courts and then failing to update the information, the group said.

Oral arguments have not yet been scheduled in the case. WJ

(Reporting by Daniel Wiessner)

Attorneys:
Plaintiff: John Soumilas, Francis & Mailman, Philadelphia, PA

Defendant: Frederick Smith, Seyfarth Shaw LLP, Atlanta, GA

4th Circuit says Maryland casino may owe trainees minimum wage

(Reuters) – A Maryland casino may have violated wage-and-hour laws by refusing to pay job applicants who attended an intensive "dealer school" designed to recruit hundreds of workers, a U.S. appeals court said April 25 in reviving a proposed class action.

Harbourt et al. v. PPE Casino Resorts Maryland LLC et al., No. 15-1546, 2016 WL 1621908 (4th Cir. Apr. 25, 2016).

A unanimous three-judge panel of the 4th U.S. Circuit Court of Appeals said a lower court erred in dismissing the 2014 lawsuit against PPE Casino Resorts Maryland LLC, represented by Venable, because it was not clear if the training was primarily for the benefit of the workers or the company.

It was the first time the 4th Circuit addressed the legal status of such trainees under the federal Fair Labor Standards Act since 1989, when the court said trainees for a food distribution company were employees because they performed regular work. Few similar cases have been decided by other U.S. appeals courts.

PPE in 2012 set up the free training program after Maryland lawmakers legalized table games at casinos. The company aimed to hire more than 800 dealers to work at one of its casinos, Maryland Live!

Hundreds of trainees were required to attend the sessions for at least 20 hours per week for up to three months, ending days before Maryland formally lifted its ban on table games at casinos.

Three trainees, including one who was ultimately hired, filed a proposed class action against PPE in 2014 in U.S. District Court for the District of Maryland, claiming they were owed the minimum wage for the training period under the FLSA and a similar state law.

U.S. District Judge Catherine Blake last year granted PPE's motion to dismiss the case, saying the training was primarily for the plaintiffs' benefit since they learned skills they could use in other jobs. *Harbourt v. PPE Casino Resorts Md. LLC*, No. 14-3211, 2015 WL 1814772 (D. Md. Apr. 21, 2015).

REUTERS/Kim Hong-Ji

The proposed class action claims the casino dealer trainees were owed the minimum wage for the training period under the FLSA and a similar state law.

The 4th Circuit disagreed, saying the plaintiffs' claims that the training focused largely on PPE's unique policies and was designed solely to cultivate a workforce were enough to survive a motion to dismiss.

"A fact finder could conclude that requiring applicants to attend a training 'school' ... demonstrates that the casino conceived or carried out its 'school' to avoid paying the minimum wage," Circuit Judge Diana Motz wrote.

The panel also included Circuit Judges Stephanie Thacker and Roger Gregory.

Steven Lubar of the Law Offices of Peter Nicholl in Baltimore, who represents the plaintiffs, did not return a request for comment. Nor did PPE and its lawyer, Todd Horn.

The court cited a 1947 U.S. Supreme Court ruling in *Walling v. Portland Terminal Co.*, 67 S. Ct. 639 (U.S. 1947), that said the FLSA did not apply to railroad trainees because their training was mainly for their benefit, but said some trainees may qualify as employees.

The Portland Terminal case has also been cited by several courts in recent years in cases involving unpaid interns. The 2nd Circuit last year said that under *Portland Terminal*, unpaid internships are legal when they are designed primarily to further the education of interns but not when companies use them to farm out traditional work. *Glatt v. Fox Searchlight Pictures Inc.*, 791 F.3d 376 (2d Cir. 2015). WJ

(Reporting by Daniel Wiessner)

See Related Court Document:
Opinion: 2016 WL 1621908

See Document Section C (P. 37) for the opinion.

EEOC can subpoena employer on undocumented worker's complaint, 4th Circuit rules

(Reuters) – The Equal Employment Opportunity Commission's subpoena powers include the authority to probe companies based on discrimination complaints filed by undocumented immigrants, a federal appeals court ruled April 25.

Equal Employment Opportunity Commission v. Maritime Autowash Inc., No. 15-1947, 2016 WL 1622290 (4th Cir. Apr. 25, 2016).

In what appeared to be the first appellate ruling of its kind, a divided three-judge panel of the 4th U.S. Circuit Court of Appeals rejected claims by Maritime Autowash Inc. of Maryland that undocumented immigrants are not "qualified for employment" under Title VII of the Civil Rights Act of 1964, and thus the EEOC cannot investigate their complaints.

The agency in 2014 subpoenaed personnel files, wage records and other employment data from Maritime after Elmer Escalante, an undocumented worker, filed a complaint claiming the company paid Hispanic workers less and gave them shorter breaks than others.

U.S. District Judge George Russell in Maryland in 2015 quashed the subpoena, agreeing with Maritime that the EEOC could not pursue the case because no remedies were available for Escalante under Title VII. *EEOC v. Maritime Autowash Inc.*, No. 15-cv-896, *order issued* (D. Md. June 23, 2015).

The 4th Circuit reversed April 25.

"Maritime's challenge to the EEOC's subpoena envisions a world where an employer could impose all manner of harsh working conditions upon undocumented aliens," Circuit Judge J. Harvie Wilkinson wrote, "and no questions could be asked, no charges filed, and no agency investigation so much as begun."

Wilkinson was joined by U.S. District Judge David Norton of the District of South Carolina, who sat by designation.

EEOC General Counsel P. David Lopez in a statement said he was pleased with the ruling.

Maritime's lawyer, John Vander Woude of Eccleston & Wolf in Maryland, did not return a request for comment.

Circuit Judge Paul Niemeyer in a concurring opinion said the EEOC may pursue only "valid" complaints, and that in probing Maritime it was stepping on the toes of federal agencies charged with enforcing immigration laws.

But in Maritime's case, Judge Niemeyer said, the agency's subpoena was enforceable because Escalante's complaint included claims on behalf of others who were authorized to work in the U.S.

The EEOC has long maintained that Title VII prohibits discrimination against any worker in the United States, regardless of immigration status, but the question of whether the law applies to undocumented workers has not been addressed by most U.S. appeals courts.

Judge Wilkinson in the ruling stressed that the court had not considered that larger issue, ignoring Maritime's argument that any lawsuit filed by the EEOC or Escalante would ultimately be dismissed.

The company cited a pair of decisions that found there are no remedies under federal labor laws for undocumented workers. In the 1998 case *Egbuna v. Time-Life Libraries*, 153 F.3d 184(1989), the 4th Circuit dismissed a retaliation suit brought by a plaintiff with an expired work visa. And the U.S. Supreme Court in the 2002 case *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002), said an undocumented worker could not collect a back pay award under the National Labor Relations Act.

But the 4th Circuit on April 25 said those cases were decided much further along in the process, and that Judge Russell had no authority to consider the merits of a potential lawsuit against Maritime when the EEOC asked him to enforce its subpoena. WJ

(Reporting by Daniel Wiessner)

Related Court Document:
Opinion: 2016 WL 1622290

See Document Section D (P. 42) for the opinion.

Dispute over California workers' comp program moved to federal court

Three insurance companies have removed to San Francisco federal court a proposed $100 million class-action lawsuit over their workers' compensation program's alleged violations of California law.

Pet Food Express Ltd. v. Applied Underwriters Inc. et al., No. 16-cv-1539, notice of removal filed (N.D. Cal. Mar. 29, 2016).

Applied Underwriters Inc., Applied Underwriters Captive Risk Assurance Inc. and California Insurance Co. say all the requirements under the federal Class Action Fairness Act to move the case to the U.S. District Court for the Northern District of California have been met.

According to the complaint filed by Oakland-based Pet Food Express Ltd., the lawsuit follows a January decision from the state insurance commissioner that a so-called EquityComp policy and reinsurance participation agreement the defendants issued to another California-based employer, Shasta Linen Services Inc., was void under state law.

Pet Food Express contends the RPA it signed is identical to the one issued to Shasta Linen. It filed the purported class action against the insurers in the Alameda County Superior Court. *Pet Food Express Ltd. v. Applied Underwriters Inc.*, No. RG16804604, *complaint filed* (Cal. Super. Ct., Alameda Cty. Feb. 18, 2016).

Shasta also has filed a proposed class-action lawsuit in the Eastern District of California. *Shasta Linen Supply Inc. v. Applied Underwriters et al.*, No. 16-cv-158, *complaint filed* (E.D. Cal. Jan. 26, 2016).

Pet Food Express' complaint alleges that California Insurance Co., or CIC, issued it workers' compensation policies in 2009, 2010 and 2011 that contained cancellation provisions approved by state regulators.

The company further alleges it was informed that, as a condition to receiving the EquityComp plan, it had to sign a reinsurance participation agreement with Applied Underwriters Captive Risk Assurance, or AUCRA.

Pet Food Express claims the RPA imposes a 20 percent early cancellation surcharge that is different from the approved cancellation policy in the CIC policies.

The complaint alleges that the Equity Comp program and the RPA constitute a collateral agreement under California law, but that CIC did not secure approval of the program and RPA from the state Workers' Compensation Insurance Rating Bureau and the Department of Insurance.

Pet Food Express seeks a determination that the RPA is void, rescission of the workers' compensation policies and RPAs, restitution, attorney fees, punitive damages in excess of $100 million in connection with an alleged fraud claim and injunctive relief against the marketing or sale of the EquityComp program in California.

The proposed class includes all California employers who, within four years prior to filing of the complaint, purchased an EquityComp policy from CIC along with an RPA from AUCRA.

The defendants were served with the complaint Feb. 29 and filed a removal notice March 29 under CAFA.

The statute grants federal courts original jurisdiction over class actions where:

- Any member of the proposed plaintiff class is a citizen of a state different from any defendant.
- The proposed class consists of more than 100 members.
- The amount in controversy exceeds $5 million aggregating all claims and exclusive of interest and costs.

The defendants contend each of the requirements has been met.

They say the plaintiff is a California corporation while Applied Underwriters is incorporated and principally based in Nebraska and AUCRA is organized under Iowa law and principally located in Nebraska.

The defendants further say the proposed class includes more than 100 members and that the plaintiff's request for $100 million in punitive damages satisfies the amount-in-controversy requirement.

They also say the putative class members have paid more than $5 million in EquityComp charges over the proposed class period.

The parties have agreed to an extension of time for the plaintiffs to decide whether to seek remand to state court and for the defendants to respond to the complaint, according to the docket. WJ

Attorneys:
Plaintiff: John D. Moore, Henn Etzel & Moore, Oakland, CA

Defendants: Spencer Y. Kook, Hinshaw & Culbertson, San Francisco, CA

Related Court Documents:
Notice of removal: 2016 WL 1221629
Complaint: 2016 WL 740167

RetailMeNot merger price conditioned on founder's continued employment

By Suzanne Northington

Approximately one-third of the $33 million fee RetailMeNot Inc. paid to acquire GiftcardZen Inc. is contingent upon the continued employment of the target's founder and the achievement of certain milestones.

According to an April 7 statement, Austin, Texas-based RetailMeNot, a source for digital savings offers and discounted gift cards, entered into a merger agreement with GiftcardZen, a gift-card marketer in Phoenix, Arizona, that buys unused gift cards and sells them at a discount. *RetailMeNot Inc. Form 8-K*, 2016 WL 01371621 (Apr. 7, 2016).

The agreement, which was filed with the Securities and Exchange Commission and is effective immediately, required RetailMeNot to pay $22 million in cash for the target, plus up to $11 million in deferred compensation.

The deferred compensation is contingent on the achievement of specific milestones, including performance targets and the continued employment of "key employee" and GiftcardZen founder Aaron Dragushan following the merger closing date, according to the agreement.

Under the agreement, an $11 million "founder retention payment" was withheld from the merger consideration paid at closing. The circumstances under which that money will become due are set out in a separate "founder retention agreement" between RetailMeNot and Dragushan, according to the agreement.

Other amounts that were subtracted from the purchase price include GiftcardZen's outstanding debt, certain employee expenses and merger-related expenses, according to the agreement.

RETAILMENOT EXPECTS GIFT-CARD BUSINESS PROFITS BEFORE 2018

RetailMeNot said it expects the GiftcardZen acquisition to weaken its adjusted earnings before interest taxes, depreciation and amortization by approximately $2 million. It also said in its statement that it anticipates the gift-card business segment to generate positive operating income by the end of 2017.

"We expect that GiftcardZen's existing operational capabilities and its ability to capture and grow secondary gift-card inventory pair well with the power and size of [our] audience," said Cotter Cunningham, RetailMeNot's CEO.

Under terms of the merger agreement, GiftcardZen will survive as a wholly owned subsidiary RetailMeNot, will continue to operate out of Phoenix, and its existing management team will report to Lou Agnese, senior vice president of RetailMeNot's gift-card business unit, the statement said. WJ

Related Document:
RetailMeNot Form 8-K: 2016 WL 01371621

Labor Department issues new silica safety rule

By Kenneth Bradley, Esq.

The U.S. Department of Labor has announced a new rule meant to save more than 600 lives annually by protecting workers from exposure to silica dust.

"We are taking action to bring worker protections into the 21st century," Assistant Secretary of Labor for Occupational Safety and Health David Michaels said in a March 24 statement.

Limiting exposure to "respirable" crystalline silica will reduce cases of lung cancer, silicosis, chronic obstructive pulmonary disease and kidney disease, according to the government.

The rule reduces the permissible exposure limit for crystalline silica to 50 micrograms per cubic meter of air, averaged over an eight-hour shift, the Labor Department said. Currently, the limit is about 100 micrograms per cubic meter of air.

Under the new rule, employers will be required to limit worker exposure to silica by installing better ventilation systems and using water to keep dust from getting in the air.

Previous regulations were "outdated and did not adequately protect workers," Michaels said.

Workers in the construction industry are exposed to silica-containing materials in concrete and stone, as are workers in brick manufacturing, foundries and hydraulic fracturing, the department said.

The International Union of Bricklayers and Allied Craftworkers welcomed the development.

"This is a huge step forward for millions of workers in the U.S.," union President James Boland said in a March 24 statement.

The unions' members had testified about the dangers of silica exposure at hearings the Occupational Safety and Health Administration held to consider adopting the new rule.

Some business owners are opposed to the regulation.

"Not only does this rule rely on appallingly out-of-date economic data, it also drastically underestimates the exorbitant costs that will be inflicted on manufacturers and the entire economy," National Association of Manufacturers President and CEO Jay Timmons said in a March 24 statement.

"As a result, small and medium-sized manufacturers could be forced to close their doors while others will be saddled with crushing regulations," Timmons said.

He added that manufacturers tried to work with OSHA in making the rule feasible and effective, but the agency ignored their suggestions.

The rule will be implemented in two phases.

The construction industry must comply with the rule by June 23, 2017, and employers in general industry and the maritime industry must start observing the rule June 23, 2018, according to the Labor Department's statement.

The new rule is available at http://1.usa.gov/1LMD82n. WJ

First Amendment

CONTINUED FROM PAGE 1

Justice Breyer was joined in the majority by Chief Justice John Roberts and Justices Anthony Kennedy, Sonia Sotomayor, Ruth Bader Ginsburg and Elena Kagan.

Justice Clarence Thomas, joined by Justice Samuel Alito, dissented, finding that Heffernan's First Amendment rights had not been infringed because he had not actually associated with a political candidate.

"If the facts are as Heffernan has alleged, the city's demotion of him may be misguided or wrong," Justice Thomas wrote. "But, because Heffernan concedes that he did not exercise his First Amendment rights, he has no cause of action under Section 1983."

Senior attorney Elisaveta Dolghih with Godwin PC in Dallas, who was not involved in the case, said the majority was focused on a central tenet of public employment.

"The court's majority glossed over the less-then-perfect facts of this case in order to reinforce the overarching principle — that a public employer may not treat an employee in adverse fashion based on that employee's political views, even if the employer's perception of such political views is based on imperfect information," Dolghih said.

> "The government's reason for demoting Heffernan is what counts here," Justice Stephen Breyer wrote for the majority.

She also noted that the death of Justice Antonin Scalia, which has derailed some case before the high court, had little impact on this decision.

"During the oral argument, Antonin Scalia expressed the view that Heffernan 'did not have a constitutional right not to be fired for the wrong reason.' It appears, that his remarks did not resonate with the majority and that had he voted to dismiss Heffernan's claim, the outcome would have been the same," she said. "In their dissent, Justices Thomas and Alito seemed to side with Scalia's reasoning expressed during the oral argument."

POLITICAL YARD SIGN

In his petition for certiorari, Heffernan claimed he was demoted after he was seen at a rally for a candidate challenging the city's then incumbent mayor.

> "The constitutional harm at issue ... consists in large part of discouraging employees ... from engaging in protected activities," Justice Breyer wrote.

Heffernan, who had been with the department for 21 years, maintained he was off-duty and simply picking up one of the candidate's campaign yard signs for his ailing mother, according to the petition.

He filed suit in New Jersey federal court, alleging Mayor Jose Torres had ordered the demotion as punishment for his perceived support of the rival candidate.

Heffernan sought compensatory and punitive damages, alleging violations of his freedom of speech and association and the federal civil rights statute, the petition said.

In 2014 U.S. District Judge Kevin McNulty dismissed Heffernan's suit, finding he had not shown that he exercised his free-speech rights. *Heffernan v. City of Paterson et al.*, 2 F. Supp. 3d 563 (D.N.J. 2014).

A panel of the 3rd U.S. Circuit Court of Appeals unanimously upheld the decision, citing Heffernan's testimony that he had no stake in the mayoral election and got the sign for his mother. First Amendment claims depend on conduct protected by the First Amendment, the panel said. *Heffernan v. City of Paterson et al.*, 777 F.3d 147 (3d Cir. 2015).

The Supreme Court granted Heffernan's certiorari petition in October.

EMPLOYER MOTIVE MATTERS

The high court reversed the appellate decision, finding that the actions that the city thought Heffernan had engaged in are protected by the First Amendment.

According to the opinion, the U.S. Constitution generally bars a government employer from firing or demoting an employee for engaging in political activity.

The court must look to the public employer's motive for the demotion since the city perceived that Heffernan took part in protected activity, the majority said.

The court noted that the text of the First Amendment — "Congress shall make no law ... abridging the freedom of speech" — focuses on actions by the government, not the individual.

"The constitutional harm at issue ... consists in large part of discouraging employees ... from engaging in protected activities," Justice Breyer wrote. "The employer's factual mistake does not diminish the risk of causing precisely that same harm."

The two dissenting justices concluded that the city had not denied Heffernan his First Amendment rights of speech or assembly.

"Demoting a dutiful son who aids his elderly, bedridden mother may be callous, but it is not unconstitutional," Justice Thomas wrote.

The dissent rejected the majority's conclusion an attempt to violate a Heffernan's rights is just as bad as actually depriving him of his rights.

Although Heffernan was injured — demoted — as a result of the city's unconstitutional policy, his First Amendment rights were never impinged, the minority said.

"The mere fact that the government has acted unconstitutionally does not necessarily result in the violation of an individual's constitutional rights, even when that individual has been injured," the dissenting opinion said.

The court remanded the suit.

Citing "some evidence" in the case, it said the lower courts must determine if the city was following a neutral policy that prohibits police officers' "overt involvement" in politics and if that policy is constitutional. WJ

Related Court Document:
Opinion: 2016 WL 1627953

See Document Section A (P. 25) for the opinion.

Labor & employment roundup for April 18-29

By Rebecca Ditsch, J.D.

The following are highlights of recent employment litigation, legislation and enforcement activities.

EEOC SETTLEMENTS

April 15 — California city to pay $140,000 to settle age discrimination claims. The city of Milpitas, California, has agreed to pay $140,000 to settle an age discrimination lawsuit by the Equal Employment Opportunity Commission, the agency announced. The suit alleged the city failed to hire qualified applicants over age 50 who scored higher than the 39-year old person ultimately hired for an executive secretary position, in violation of the Age Discrimination in Employment Act, 29 U.S.C.A. § 621. 2016 WL 1505601

April 26 — Court issues $7.6 million judg-ment against company that mistreated guest farm workers. A federal judge in Spokane, Washington, entered a $7.6 million default judgment against Global Horizons Inc. after the farm labor failed to answer Equal Employment Opportunity Commission allegations that it mistreated Thai workers. The judge found Global recruited Thai workers, who paid recruitment fees to the company, and brought them to the United States on H-2A guest worker visas. Global required the workers to surrender their passports to their supervisors, threatened them with deportation or arrest if they complained, prohibited workers from speaking with outsiders and gave them a curfew, the judge's order said. 2016 WL 1677140

WAGE-AND-HOUR LAWSUITS AND SETTLEMENTS

April 18 — Company said raising salaries exempted workers from overtime, will pay $1 million. A human resources outsource provider that claimed raising an employee's salary exempted the worker from receiving overtime pay will pay $1 million in back wages. The settle U.S. Department of Labor said its investigation of San Leandro, California-based TriNet Human Resources Corp. revealed widespread violations of the Fair Labor Standards Act, 29 U.S.C.A. § 201, including failing to pay overtime to 267 employees who worked more than 40 hours per week. TriNet paid $326,000 in back wages and damages in 2012 after the DOL found similar violations. 2016 WL 1554999

April 19 — Restaurant owners owe $1.2 million in back wages, damages for FLSA violations. The owners of 13 Charleston, South Carolina-area restaurants will pay $1.2 million in back wages and liquidated damages to settle Department of Labor charges that they violated overtime, minimum wage and recordkeeping provisions of the Fair Labor Standards Act, 29 U.S.C.A. § 201. The DOL said that, between 2011 and 2014, Antonio Ayala and Jaime Tinoco made servers at their La Hacienda restaurants give a percentage of their tips back to the employer, and made three servers work for only tips. 2016 WL 1568311

April 27 — Garment factory manager guilty of attempted bribery of DOL investigator. A Los Angeles federal jury found the manager of a city garment factory guilty of two counts of attempting to bribe a U.S. Department of Labor investigator who was probing allegations of wage violations. The jury found Howard Quoc Trinh, the manager of Seven-Bros. Enterprises, offered $10,000 and paid $3,000 to a DOL wage-and-hour investigator. According to the department, the investigation found Seven-Bros. owed about $100,000 for Fair Labor Standards Act violations that occurred between May 2012 and March 2015. Trinh faces up to 30 years in prison. *United States v. Trinh*, No. 15-cr-179, *verdict returned* (C.D. Cal. Apr. 26, 2016).

SAFETY ENFORCEMENT

April 18 — OSHA issues final rule protecting Food Safety Modernization Act whistleblowers. The Occupational Safety and Health Administration published a final rule that sets procedures for handling retaliation complaints under Section 402 of the FDA Food Safety Modernization Act, 21 U.S.C.A. § 399d. Section 402 protects employees who disclose information about potential Food, Drug and Cosmetic Act violations from retaliation by employers that manufacture, process, pack, transport, distribute, receive, hold or import food. OSHA's Whistleblower Protection Program enforces the whistleblower provisions of more than 20 federal whistleblower statutes. 2016 WL 1554996

April 22 — OSHA, CDC issue guidance for protecting workers from Zika virus. The Occupational Safety and Health Administration and the Centers for Disease Control and Prevention have issued interim guidance on how to protect workers from occupational exposure to the Zika virus. The guidance targets workers in the outdoor, health care, laboratory and mosquito-control industries. U.S. health officials have concluded that Zika infections can cause microcephaly, a birth defect marked by a small head, and the World Health Organization has said there is "strong scientific consensus" that Zika can cause Guillain-Barre, a syndrome that causes temporary paralysis in adults.

April 27 — Convenience store owner cited after employee killed during attempted robbery. The Occupational Safety and Health Administration cited an Irvington, New Jersey, convenience store owner for exposing workers to workplace hazards after an employee was shot and killed during an attempted robbery. OSHA said 20 incidents of workplace violence involving armed robbery and fights had occurred at the store in the past five years and that owner Jay Management Inc. was "well aware of this history" yet "did nothing to implement safety measures to protect employees" even after the October 2015 shooting. Proposed penalties total $14,000. 2016 WL 1659137

LABOR AND PUBLIC EMPLOYMENT NEWS

LEGISLATION

April 21 — San Francisco mayor inks ordinance mandating paid parental leave. San Francisco Mayor Ed Lee signed an ordinance making it the first U.S. city to require private employers to provide paid parental leave. The ordinance covers employers that have 20 or more employees and goes into effect in three phases, beginning Jan. 1, 2017.

April 27 — Minnesota university system shelves employee data access law. The organization overseeing Minnesota's public colleges and universities put on hold a rule that allows school administrators to examine employees' privately owned phones, computers and other mobile devices if the items are used for work. According to reports, state employees and legislators objected to the rule, which took effect April 1. The state university system said in March that the rule was needed to protect government data that may be contained on employees' devices.

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Hernandez v. City of Nixon, Texas 2016 WL 1593737	Tex. Dist. Ct. (Bexar Cty.)	2016CI06594	4/15/16	The city of Nixon, Texas, wrongfully terminated the former police chief in retaliation for his reporting violations by other employee.	Lost pay and benefits, compensatory and punitive damages, interest, fees, and costs
Amaya v. United Parcel Service 2016 WL 1593748	Cal. Super. Ct. (L.A. Cty.)	BC617526	4/19/16	UPS violated the California labor code by discriminating against employee based on age and disability, failed to accommodate disability and fired him in retaliation for complaints.	Compensatory and punitive damages, injunction, interest, fees, and costs
Mason v. Eckerd Youth Alternatives Inc. 2016 WL 1610955	Fla. Cir. Ct. (Pinellas Cty.)	16-002579-CI	4/20/16	Eckerd Youth Alternatives Inc. interfered with its vice president of human resources' rights under the Family and Medical Leave Act by terminating her while she was on leave.	$15,000 in front and back pay and benefits, liquidated damages, interest, fees, and costs
Cortez v. Ramirez 2016 WL 1695261	Or. Cir. Ct. (Clackamas Cty.)	16CV13506	4/22/16	Class action. Defendant labor contractors violated Oregon wage-and-hour laws by willfully failing to pay plaintiff and other class members wages owed in 2014 for seasonal work making wreaths at defendants' warehouse.	Class certification and between $50,000 and $100,000 in damages
Mattachine Society of Washington v. U.S. Department of Justice 2016 WL 1700345	D.D.C.	16-cv-773	4/27/16	The U.S. Department of Justice failed to provide documents requested by the Mattachine Society of Washington about internal FBI correspondence regarding executive order 10450, including all files created by a DOJ official from 1950-1990.	Order to conduct searches on records, order to process and disclose the requested records, fees and costs

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

PENNSYLVANIA TRANSIT COMPANY DIDN'T TELL DRIVERS OF BACKGROUND CHECKS, SUIT SAYS

The Southeastern Pennsylvania Transportation Authority violates the federal Fair Credit Reporting Act by failing to clearly tell job applicants that they may be subject to a background check, a proposed class action filed in Philadelphia federal court says. The suit was filed after the transit company rescinded a job offer to licensed bus driver Frank Long when a background check showed a 20-year-old drug conviction on his record. The suit also alleges SEPTA violates the state's Criminal History Record Information Act because it disqualifies applicants based on unrelated convictions. The suit seeks injunctive relief and unspecified statutory damages on behalf of a class of individuals who have been affected by SEPTA's background checks in the past two years.

Long v. Southeastern Pennsylvania Transportation Authority, No. 16-cv-1991, complaint filed (E.D. Pa. Apr. 27, 2016).

Related Document:
Complaint: 2016 WL 1695266

TRANSGENDER PROFESSOR SUES MICHIGAN UNIVERSITY FOR DISCRIMINATION

Saginaw Valley State University fired a professor from her part-time administrative position after she transitioned from a man and began identifying as a woman three years ago, according to a suit filed April 8 in Detroit federal court. Professor Charin Davenport alleges the university told her the administrative position was being eliminated for budgetary reasons but says her direct manager, Ann Coburn-Collins, harassed her following her transition and called her a liar. According to the complaint, Davenport began working for the university as an adjunct English professor in 2007 and was given the part-time administrative post in 2011. She transitioned from a man to a woman in 2013, the suit says. The suit includes sex discrimination claims against the university and Coburn-Collins under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Davenport seeks reinstatement, lost wages and unspecified punitive damages.

Davenport v. Saginaw Valley State University et al., No. 16-cv-11289, complaint filed (E.D. Mich. Apr. 8, 2016).

Related Document:
Complaint: 2016 WL 1403173

PHILIP MORRIS REPORT CLAIMS IMPROVEMENT IN LABOR CONDITIONS

A new report by Philip Morris International Inc. says the company has improved labor conditions on 450,000 tobacco farms across the globe. The company said in a March 31 statement that its Third Agricultural Labor Practices Program Progress Report shows its "commitment to Good Agricultural Practices (GAP) in its tobacco-growing supply chain." These practices aid farmers in improving productivity and crop quality, showing respect for the environment, and maintaining safe and fair labor practices on farms, the statement said. Miguel Coleta, Philip Morris' sustainability officer, said in the statement that the company has made "tangible progress" in the area, including significant reductions in child labor in several countries.

CASE AND DOCUMENT INDEX